MASSACHUSETTS LAWYERS WEEKLY

Date: Monday, May 20, 2019
Location: BOSTON, MA
Circulation (DMA): 8,000 (7)
Type (Frequency): Magazine (W)
Page: 4
Section: Main
Keyword: Suffolk University Law School Alumni

Hearsay

hcampagne@lawyersweekly.com

Failing grade

Bar-review behemoth Barbri may have bested a competitor trying to carve out a niche that caters to foreign attorneys in pursuit of master-of-law degrees from U.S. law schools, but it didn't do so by engaging in a wide-ranging conspiracy with those schools, the 2nd U.S. Circuit Court of Appeals confirmed recently.

Plaintiff LLM Bar Exam, which launched in 2009, alleged that Barbri had not only stolen its proprietary idea of focusing on foreign LL.M. candidates and disparaged the plaintiff to its would-be clients, but it engaged in a campaign to monopolize the market by making hefty donations to law schools, bribing administrators, and offering plum bar-prep teaching jobs to faculty.

One of LLM Bar Exam's main allegations was that, with Barbri's encouragement, the 10 law schools named as defendants — five in New York, plus Harvard, Duke, the University of Southern California, Georgetown, Emory and the University of California — conspired to freeze out the plaintiff from "tabling." The term refers to a practice in which a bar-prep company is given space in a high-traffic area to pitch its services and sign up students — a "cornerstone" of bar review companies' marketing efforts, according to the plaintiff's complaint.

In addition to a variety of state-law claims, LBE sought relief under Sections 1 and 2 of the Sherman Act, the Racketeer Influenced and Corrupt Organizations Act, and the Copyright Act.

But in a 76-page opinion issued Sept. 25, 2017, U.S. District Court Judge **Katherine Polk Failla** in New York City dismissed LBE's claims in their entirety, though she allowed for the state law claims to be refiled in state court.

On April 25, the 2nd Circuit endorsed Polk Failla's opinion "in all respects."

The failure of the plaintiff's first amended complaint was not for the lack of heft. Polk Failla notes it was 78 pages long and contained 63 exhibits.

"But it pleads no facts that plausibly support LBE's federal antitrust, RICO, or copyright claims," she writes.

Indeed, many of the exhibits were "extremely harmful for the plaintiff's case," says Boston attorney **Christopher T. Holding**, part of a **Goodwin** team that defended Barbri.

"What they showed over and over again was that many of the schools had their own independent reasons not to have LBE on campus," Holding says.

LBE alleged that Barbri and the law schools were parties to agreements, but the complaint failed to make clear whether those agreements were oral or written, or when they had been entered into, Polk Failla notes.

After taking a painstaking tour through LBE's often unsuccessful efforts to maintain its table space at the defendant law schools, Polk Failla explains why LBE's complaint "fails to state a claim for relief under any federal statute."

For example, for its claim that the defendants conspired to restrain trade in violation of 15 U.S.C. §1, LBE could show neither a "combination or some form of concerted action between at least two legally distinct economic entities" nor an unreasonable restraint on trade.

While the various schools may have engaged in "parallel conduct" over vaguely the same time period, LBE had not placed those actions in a "context that raises a suggestion of a preceding agreement," Polk Failla writes.

Indeed, there were "obvious alternative explanations" for the conduct of administrators at the law schools, one of which was that they were concerned about the quality of LBE's bar review course and the company's business practices, based on feedback from students and their involvement in battles with LBE over refunds students felt they were due.

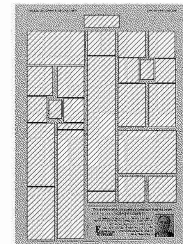
Polk Failla writes that the law schools' reactions were "'independent responses to common stimuli' ... not a coordinated effort to stifle competition."

LBE had not established that there was a distinct market for LL.M. students, given that LL.M. students and J.D. students alike take the same bar exam, Polk Failla notes. Nor had LBE shown how competition had suffered within the alleged market because of Barbri's actions, she adds.

As for its RICO claim, Polk Failla found that LBE had established neither a "pattern of racketeering activity" nor a RICO "enterprise."

Meanwhile, LBE's copyright claim failed for a "simple reason": Its complaint did not allege it held — or even had applied for — a copyright in its course materials, the judge writes.

But Barbri isn't free of LBE just



© 2019 MASSACHUSETTS LAWYERS WEEKLY
All Rights Reserved.

Account: 30468B (17640)
-4151
For reprints or rights, please contact the publisher

yet. Holding says LBE reacted to Polk Failla's decision by "walking across the street" to file its state-law claims, a suit that is "just getting going."

LBE's attorney, **Judd R. Spray** of New York, says his client is obviously disappointed with the result in the 2nd Circuit but is hopeful about its claims against the New York-based schools and Barbri for allegedly interfering with its actual and prospective contract rights with LL.M. students at the various schools.

— Kris Olson

Totally floored

The Federal Trade Commission has singled out National Floors Direct for enforcement of a new federal law prohibiting businesses from including "non-disparagement" clauses in their contracts that bar customers from posting negative reviews online.

National Floors was one of three companies targeted by proposed administrative complaints unveiled May 8 alleging violations of the Consumer Review Fairness Act.

Enacted in 2016, the CRFA prohibits provisions in form contracts that bar or restrict a consumer's ability to communicate reviews or performance assessments about a seller's goods or services.

According to the FTC, the Braintree-based carpet and flooring company violated the CRFA by inserting in its sales contracts language threatening penalties of up to three times the value of a customer's order for breaching an agreement "not to publicly disparage or defame National Floors Direct in any way or through any medium." The non-disparagement clause warned that while the company wanted all its customers to be 100 percent satisfied, "[w]e also take our reputation very seriously."

The FTC's complaint alleged that the company included prohibited clauses in "thousands" of contracts offered to customers in Massachusetts, Rhode Island and New Hampshire between approximately July 2016 and April 2018.

The FTC has announced that each of the three targeted companies has reached tentative settlements. For example, under a consent agreement incorporated in a proposed decision, National Floors would end the use of "review-limiting" contract terms and promptly notify existing customers that such terms are void. National Floors also would neither admit nor deny the FTC's allegations under the settlement.

The proposed decision will be subject to a 30-day public comment period before final approval by the FTC.

Boston litigator **David H. Rich** represents the flooring company in the FTC action. The **Todd & Weld** attorney says the problem arose because National Floors merely failed to update the language in its customer contracts with the passage of the CRFA.

"As soon as they became aware that the law had been passed, they took it out of all of their contracts," Rich says, adding that the company never resorted to enforcing the non-disparagement clause.

In addition to National Floors, the agency announced similar enforcement actions against a Pennsylvania-based heating and cooling services business and a Nevada recreational horseback riding company.

Kathleen C. Engel, a professor at Suffolk University Law School, says that the CRFA was enacted in response to a flurry of suits against consumers who had written negative reviews about products or services and had been sued under boilerplate non-disparagement language in their contracts.

The preservation of the right of someone to write and post an honest review serves an important purpose, Engel argues.

"The public more and more depends on reviews to be able to make decisions," she says. "These non-disparagement clauses interfere with the market by preventing consumers from knowing the true quality of a product. Certainly, the threat of being sued by a company would chill folks from making any kind of negative comments about an entity."

But Rich says that false negative reviews pose a serious threat to companies that provide services.

"It places businesses in a very precarious situation when any person — whether they're an actual customer or not — can go online and make stuff up," he says.

Rich adds that the ability to file a defamation suit against someone who's posted a false review often does not provide a business with a satisfactory remedy for the harm caused, particularly when considering the difficulty of identifying the true author of a post.

"That was why [National Floors] in the first instance tried to prevent or restrict how cavalier people are about posting information online that may not be accurate," he says.

— Pat Murphy

© 2019 MASSACHUSETTS LAWYERS WEEKLY
All Rights Reserved.

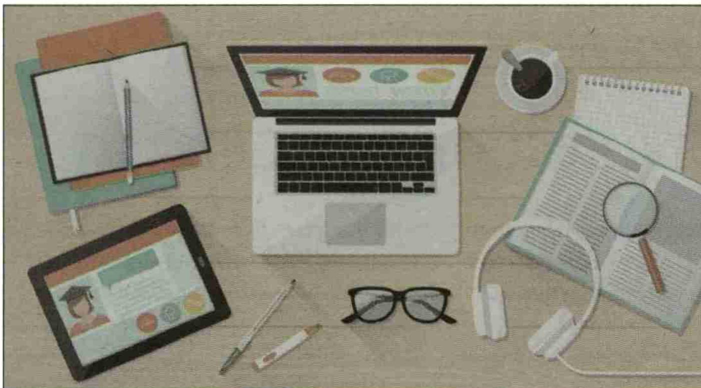
For reprints or rights, please contact the publisher

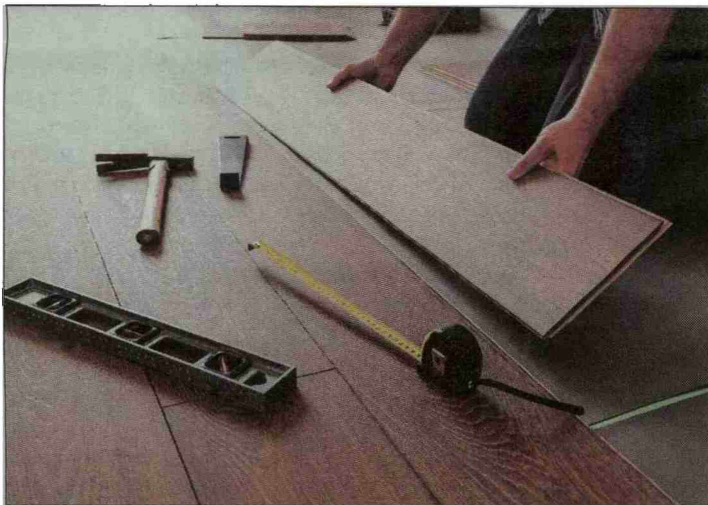
MASSACHUSETTS LAWYERS WEEKLY

Date: Monday, May 20, 2019
Location: BOSTON, MA
Circulation (DMA): 8,000 (7)
Type (Frequency): Magazine (W)
Page: 4
Section: Main
Keyword: Suffolk University Law School Alumni

HOLDING

RICH


©ELENABS


©PATRYK_KOSMIDER

© 2019 MASSACHUSETTS LAWYERS WEEKLY
All Rights Reserved.

Account: 30468B (17640)
-4151
For reprints or rights, please contact the publisher